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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1979

No. 79-126

CHARLES R. DUDLEY and
DELORES S. DUDLEY,

Appellants,

vs.

NEBRASKA STATE BANK,

Appellee.

On Appeal From The
Supreme Court of Nebraska

MOTION TO DISMISS OR AFFIRM

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I.

THE STATE STATUTE INVOLVED AND THE
NATURE OF THE CASE.

A.

The Statute

This Appeal challenges the consti-
tutionality of Section 25-1912 of the
Revised Statutes of Nebraska (Section

25-1912, R.R.S. 1943). The statute instructs the reader concerning the methodology of securing jurisdiction of the Nebraska Supreme Court to review judgments of the District Courts in that State. Specifically, Section 25-1912 provides that the steps required to give the Nebraska Supreme Court jurisdiction are: (1) filing a Notice of Appeal; and (2) depositing of a docket fee. The statute further provides that only these two steps are "deemed jurisdictional".

The rules for preserving trial court error for review on appeal to the Nebraska Supreme Court are found elsewhere. Specifically, Section 25-1143 of the Nebraska Revised Statutes (Section 25-1143, R.R.S. 1943) provides that a Motion for New Trial must be filed within ten (10) days after a jury verdict. Moreover, Nebraska common law has long held that if an appellant fails to file

a Motion for New Trial within that time period, the Supreme Court of that State will limit its review to a determination of whether the judgment is supported by the pleadings.

B.

The Proceedings Below

Appellee, Nebraska State Bank, commenced a replevin action against Appellants in 1972. Appellants counterclaimed for damages. After an adjudication that the replevin was wrongful, a trial was held on the issue of whether Appellants were damaged. The jury in that trial determined that Appellants sustained no damage and a judgment was entered for the Appellee bank.

Appellants timely filed and served a Notice of Appeal and paid the docket fee. They failed, however, to file a Motion for New Trial within ten (10) days after the verdict. An application to permit

late filing of the Motion for New Trial was denied by the Trial Court.

Appellants then sought review of the Trial Court's ruling by the Nebraska Supreme Court and contended that Section 25-1912, is unconstitutional for violation of the Due Process and Privileges and Immunities clauses of the Fourteenth Amendment to the United States Constitution. The Nebraska Supreme Court rejected Appellants' constitutional challenge to the statute and affirmed the trial court.

II.

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT.

A State is not compelled by the Federal Constitution to provide Appellate Courts or a right to appellate review.

McKane vs. Durston, 153 U.S. 684, 687-88, 14 S. Ct. 913, 38 L. Ed. 867 (1894). "It

is wholly within the discretion of the State to allow or not to allow such a review." McKane vs. Durston, 153 U.S. at 687-88.

If a State chooses, however, to authorize appellate review of Trial Court decisions, it may establish rules to administer such review. The Court observed in McKane that "[t]he right of appeal may be accorded by the State to the accused upon such terms as in its wisdom may be deemed proper." McKane v. Durston, 153 U.S. at 687-88. In this regard, it has been held that a State may lay down conditions it deems appropriate for appeals:

The different States and the same State from time to time have conditioned criminal appeals by fixing the time within which an appeal may be taken, by delimiting the scope of review, by shaping the mechanism by which alleged errors may be brought before the Appellate Tribunal, and so forth.

Griffin vs. Illinois, 351 U.S. 12, 18, 76

S. Ct. 585, 590, 100 L. Ed. 891, 896 (1955).

The Nebraska statute (Section 25-1912, R.R.S. 1943) challenged by Appellants in the instant case merely identifies the jurisdictional prerequisites for an appeal in that State. Surely it is within the power of a State to require a Notice of Appeal and a Docket Fee, for such conditions are essential, reasonable administrative components of any appeal process.

Appellants assert in their Jurisdictional Statement that Section 25-1912 is "vague and indefinite." Due process challenges on the basis of vagueness usually proceed along the theory that a statute is of uncertain meaning, or without identifiable and understandable standards. Giaccio vs. Pennsylvania, 382 U.S. 399, 402-03, 86 S. Ct. 518, 520-21 (1966). Section 25-1912, R.R.S. 1943 is

not subject to such a challenge for it has identifiable "standards". Indeed, Appellants satisfied the procedural requirements of the statute by filing in a timely fashion the Notice of Appeal and the Docket Fee. Having performed the steps required of them by Section 25-1912, Appellants should not be heard to contend that it was too vague for them to understand.

Appellants' assignment of error actually goes to the alleged "incompleteness" of Section 25-1912. Reduced to its bare essentials, Appellants assert that, in order to pass constitutional muster, the statute which defines Appellate Court jurisdictional prerequisites (in this case, Section 25-1912) must also instruct the reader concerning methodology of preserving trial court error (in this case, the subject matter of Sections 25-1142, 25-1143, and 25-1144). As noted in

the opinion of the Nebraska Supreme Court (see Jurisdictional Statement, Appendix "A", p. 30), such "completeness" is not required by the Constitution of the United States. The Appellants' Jurisdictional Statement on file herein cites no authorities or reasoned arguments to the contrary.

Sections 25-1142, 25-1143, and 25-1144 - indirectly challenged by Appellants - establish a proper condition delimiting the scope of review. For more than a century, Nebraska jurisprudence has recognized the rule that, in order to preserve error for appeal, a timely Motion for New Trial must alert the trial judge to alleged prejudicial error. Wells, Fargo & Co. vs. Preston, 3 Neb. 444 (1872); and Nebraska Children's Home Soc. vs. Collins, 195 Neb. 531, 239 NW2d 258 (1976). This rule - one of judicial economy - is based upon the

proposition that trial judges should be given an opportunity to correct errors and thereby avert unnecessary appeals.

No right of Appellants protected by the Privileges and Immunities Clause of the Fourteenth Amendment to the United States Constitution has been abridged. Appellants had a full and fair trial in the Nebraska Trial Court, and they pursued and were given limited appellate review, pursuant to well known, long-standing rules of law, in the Nebraska Supreme Court. Though the review by the Nebraska Supreme Court was of a limited nature, the limitation on the scope of review is supported by a legitimate administrative policy as noted above. Appellants failed to follow a well established, clearly stated rule for preserving alleged trial court errors. Accordingly, for all the reasons stated above in the discussion concerning Due

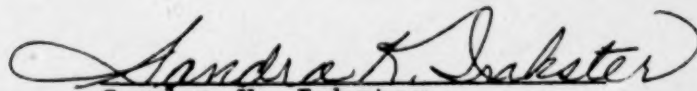
Process, Section 25-1912 does not violate the Privileges and Immunities Clause of the Fourteenth Amendment to the United States Constitution.

III.

CONCLUSION

WHEREFORE, Appellee respectfully submits that the questions upon which this cause depends are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss the appeal; or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Nebraska.

Respectfully submitted,


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Attorney for Appellee

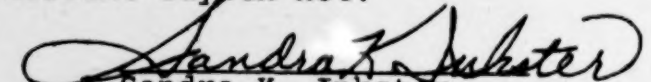
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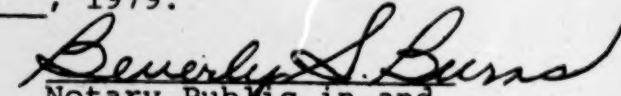
I, Sandra K. Inkster, being first duly sworn upon oath do depose and state as follows:

I personally served three copies of the foregoing Motion to Dismiss or Affirm upon John T. O'Brien, counsel for appellant at 922 Douglas Street, Sioux City, Iowa, on August 21, 1979.

Further affiant sayeth not.


Sandra K. Inkster

Subscribed and sworn to before me by the said Sandra K. Inkster this 21 day of August, 1979.


Notary Public in and
for said County and
State.

